Supreme Court, U.S.
FILED
JUL 3 1991
OFFICE OF THE CLERK

90-1946

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1990

PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

V

SABRINA WILCOX

RESPONDENT

MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS

AFFIDAVIT IN SUPPORT

BRIEF IN OPPOSITION TO A WRIT FOR CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

CRAIG A. DALY (P27539)
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Counsel of Record
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NOW COMES the Respondent, SABRINA WILCOX, by and through her attorneys CRAIG A. DALY and ARTHUR J. TARNOW who files this motion pursuant to Rule 39 of this Court and states as follows:

1. Respondent, Sabrina Wilcox, has been appointed the undersigned counsel to represent her throughout the state court appellate proceedings due to her indigency (See attached order).

2. The undersigned counsel has been unable to contact the Respondent after diligent attempts at her last known address for the purpose of signing an affidavit pursuant to this motion (See attached Affidavit of Counsel).

3. Attached is the undersigned counsel's affidavit attesting to the above statements.

WHEREFORE for all of the foregoing reasons, the undersigned requests this Honorable Court to allow the Respondent to proceed informa pauperis.

Respectfully submitted,

CRAIG A. DALY (P27539)
Attorney for Respondent
577 E. Larned, Suite 240
Detroit, MI 48226
(313) 963-1455

ARTHUR J. TARNOW (P21270)
Counsel of Record
1756 Penobscot Building
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Dated: July 3, 1991

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AFFIDAVIT OF COUNSEL

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

CRAIG A. DALY, being duly sworn, deposes and says, that the following is true to the best of his knowledge, information, and belief:

1. On March 8, 1989, the Honorable Dalton A. Roberson, Judge of Detroit Recorder's Court, entered an order for Appointment of Counsel and Transcript at Public Expense, a Petition for Appointment of Counsel and Affidavit in Support of Indigency having been filed by Defendant.

2. The undersigned court appointed counsel has represented Defendant in the Michigan Court of Appeals and Supreme Court pursuant to the court's order.

3. Counsel's attempts to locate Defendant by mail and telephone have been unsuccessful; the post office indicating she has moved with no forwarding address available and the telephone number disconnected.

4. The undersigned has not received or been able to obtain other information as to the Defendant's whereabouts.

CRAIG A. DALY

Subscribed and sworn to before me
this 3rd day of July, 1991.

Melinda D. Zawal
Notary Public, Macomb County, MI
Acting in Wayne County, MI
My Commission expires: 1-30-95

Called 2-6-89 DW

PROSECUTORS APPEAL

STATE OF MICHIGAN

IN THE RECORDER'S COURT OF THE CITY OF DETROIT

Appeal - Ct Comm'ky Prac - C.P. 4-5874

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

File No. 88-007808

WILCOX, SABRINA

Defendant

Address or Inmate No. 4439 LAKEPOINTE, DETROIT, MICHIGAN

ORDER FOR APPOINTMENT OF COUNSEL AND TRANSCRIPT AT PUBLIC EXPENSE

P R O S E C U T O R S A P P E A L

At a session of said Court held this date March 8, 1989

Present: HONORABLE HENRY L. HEADING

Judge of the Recorder's Court

A Petition for Appointment of Counsel and Affidavit in support of indigency having been filed by the defendant, and said Petition and Affidavit having been considered by the Court, THE Court finds that the defendant is without means to secure counsel for appellate review in said cause.

IT IS HEREBY ORDERED, That Craig Daly P27539 Attorney-at-Law, address 577 E. Larned, Detroit, Michigan 48226 (313) 963-1455, be assigned as counsel for the defendant in post-conviction proceedings, and

It Is Further Ordered, That the Court Reporter(s), furnished to counsel the portion of the transcript checked below required by counsel for the perfection of an appeal, and that the reporter be compensated for the transcript as provided by law.

COURT REPORTER(S)

- ☐ JURY TRIAL _____ Date(s) _____
- ☐ WAIVER TRIAL _____ Date(s) _____
- ☐ PLEA _____ Date(s) _____
- ☐ SENTENCE _____ Date(s) _____
- ☒ OTHER - Trial in progress - Dismissal by Court. NORMAN BARKER DATE - 11-30-88

FINAL DISPOSITION: CHARGE D/CON S/SCH

SENTENCE

PROOF OF SERVICE

Copies of this Order were mailed to:
Counsel, Court Reporter, Defendant
Appellate Division — Recorder's Court
Appellate Division — Prosecutors Office
Clerk of the Court of Appeals and the
Court Reporter Supervisor

Irene McCray

Deputy Clerk

Dalton A. Roberson

Judge of the Recorder's Court

Dalton A. Roberson for and in the abs of Henry L. Heading

RC #24

IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1990

PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

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SABRINA WILCOX

RESPONDENT

BRIEF IN OPPOSITION TO A WRIT FOR CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I. IS RETRIAL BARRED BY THE DOUBLE JEOPARDY CLAUSE BECAUSE THE DEFENDANT DID NOT RETAIN CONTROL OVER THE PROCEEDING WHERE (1) THE TRIAL JUDGE DISMISSED THE CASE SUA SPONTE MID-TRIAL WITHOUT CONSULTING THE DEFENDANT, (2) THE DISMISSAL WAS FOR THE PURPOSE OF PROSECUTORIAL LAW REFORM, (3) THE DEFENDANT EXPLICITLY ASSERTED HER RIGHT AGAINST DOUBLE JEOPARDY, (4) THE TRIAL COURT REFUSED TO RECOGNIZE THE ASSERTION, BUT, (5) THE TRIAL COURT NOTED THAT THE ISSUE WAS PRESERVED FOR APPEAL?

II. IS THE MICHIGAN COURT OF APPEALS DECISION RELYING ON STATE LAW BASED ON INDEPENDENT STATE GROUNDS?

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OPINIONS OF COURT BELOW

Petitioner's statement of opinions of the Courts below is adequate.

STATEMENT OF JURISDICTION

The Court's jurisdiction would be invoked under 28 USC 1257(a), subject to Issue II infra.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's Statement of Constitutional Provisions involved is adequate.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of this Court, the Petitioner's statement of the case omitted the following significant facts, set forth in chronological order:

1. Prior to dismissing the case, the trial judge discussed the dismissal ex parte with the Chief Appellate attorney of the Wayne County Prosecutor's Office. The prosecutor informed the trial judge that he was unaware of any Michigan case law on the issue and assured the court that the prosecution would therefore appeal the Fourth Amendment issue relating to a person other than the defendant.

"THE COURT: You're not offending me. I've talked to Mr. Baughman. He assures me he's going to appeal. Now what more do you want. Let's get the law straightened out" (82a).

" . . . I would not make a decision until I had a chance to get back in my office and read the law and talk to the people in the Prosecutor's Office in the Appeals Division" (87a).

"I've talked with the Chief Appellate Lawyer. And I couldn't remember coming across this question. He tells me that as far as he's concerned there is no case in Michigan on this point" (79a).

2. The defense was never consulted before the dismissal.

3. The dismissal was for the purpose of allowing the Michigan Appellate Courts to make an advisory ruling which would expand police powers and was not for the benefit of Ms. Wilcox.

"THE COURT: And my feeling is that under these circumstances an officer should have the right to go in that home immediately and arrest a person who is selling drugs." (80a)

* * * *

"I'm talking about the law. I'm trying to protect these officers." (83a)

* * * *

"I'm trying to protect you [the police], and give you more rights than you have. And I think I ought to do that." (83a)

* * * *

"But, if we get them to adjudicate it and say yes you're right to go in there, look how far in advance you would be. You wouldn't have to run back downtown to get a search warrant." (84a)

* * * *

"There are too many, in my opinion, legal technicalities that, now, let me be careful in what I'm going to say, in times like they are now to stop these dope people." (89a)

* * * *

"So, I'm going to try to straighten this thing out. The police have got to have something to battle with." (90a)

4. The Petitioner never objected to the dismissal.

5. The Respondent's attorney specifically asserted double jeopardy rights to the trial judge, who refused to recognize them, but did note that the issue was preserved for appeal.

"MR. BASS (defense counsel): Before the Jury comes out I have a question as well. Where is that going to put the defendant's position if they answer that question? I think as far as whether or not the search warrant -- I guess one of the questions was whether or not -- was whether or not the sufficiency of the police operation violated the defendant's right to search and seizure.

THE COURT: Well, you can bring all that up.

MR. BASS: Okay. Well, but we're talking jeopardy because --

THE COURT: No, this wouldn't be jeopardy. The prosecutor has the right now to appeal. And thank God he has. At one time he wouldn't have the right to appeal. But, he does have the right to appeal now and reinstate that case if I'm wrong.

MR. BASS: About the question of whether or not --

THE COURT: The officer had a right to go in that house.

MR. BASS: I'm in agreement, of course, with the Court's dismissing this case, but from the viewpoint of the rights of this defendant how -- what kind of bearing is that?

THE COURT: Well, see, I can't say what right the Court of Appeals is going to have. I don't know. What I want

resolved is a question of law, a very important question of law.

MR. BASS: I think it is.

THE COURT: Whether that officer had a right to go in under those circumstances. You have protected the record. (85a-86a) (emphasis added).

6. The dismissal was on the Court's own motion, after consulting ex parte with the Petitioner.

7. The trial court failed to inquire of Respondent Wilcox whether she consented to the dismissal.

8. The Michigan Court of Appeals held that the Petitioner's appeal was also barred under state statute, MCL 770.12(1); MSA 28.1109 governing the prosecutor's right to appeal and that the Michigan Constitutional prohibition against double jeopardy barred retrial. Const. 1963, Art. 1, Sec. 15; People v Benton, 402 Mich 47, 54; 260 NW2d 77 (1977).

9. Although the Michigan Supreme Court granted leave to review the issue, after full briefing and only four (4) days after oral argument, the Court vacated its leave order.

The following misstatement of fact is contained in the Petitioner's Statement of the Case:

A. The claim that the trial prosecutor argued against the dismissal (Petition p. 12) belies the record. The trial prosecutor attempted to show the "practical" considerations why the other person was not immediately arrested (i.e. there was no back up

crew) (47a). In fact, the trial prosecutor agreed that the law regarding the right to make an immediate arrest should be settled in a "little case" like the Respondent's rather than lose a big case (48a).

B. The Petitioner misconstrued the reason for dismissal by claiming that the trial court held that the police should have immediately entered the house to make an arrest without a warrant (Petition p. 13). In fact, the trial judge dismissed the case for the sole purpose of an advisory opinion. The Michigan Court of Appeals so found.

> "In mid-trial the judge dismissed the charge because he wanted this Court to render an advisory opinion on a question involving a warrantless arrest" (1a).

SUMMARY ARGUMENT AND REASONS FOR DENYING WRIT OF CERTIORARI

The Petition does not set forth any special or important reasons that would justify the granting of the Writ of Certiorari. The Petition does not mention that there were independent non-federal grounds for the decision of the Michigan Courts. (Issue II, infra). The Petitioner failed to disclose the totality of facts surrounding the case which show that the issues presented in the Petition are not worthy of review. It is noteworthy that the Michigan Supreme Court dismissed the Petitioner's appeal within four (4) days after oral argument. Specifically, the record discloses an explicit and timely assertion of double jeopardy rights

by the Ms. Wilcox to the trial judge, who refused to recognize the right, but acknowledged that the issue was preserved for appeal (Issue I, infra). Moreover, the record shows that the trial judge and prosecutor's office were seeking to expand police powers through an advisory opinion from the appellate courts by interrupting Ms. Wilcox's trial. The Petition does not claim that the Michigan Court of Appeal's opinion was erroneous in finding that the Defendant did not retain control over the proceedings (by acquiescing in the dismissal after the trial judge announced his ruling). United States v Dinitz, 424 US 600, 609; 96 S Ct 1075; 47 L Ed2d 267 (1976).

I. RETRIAL IS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF BECAUSE THE DEFENDANT DID NOT RETAIN CONTROL OVER THE PROCEEDING WHERE (1) THE TRIAL JUDGE DISMISSED THE CASE SUA SPONTE MID-TRIAL WITHOUT CONSULTING THE DEFENDANT, (2) THE DISMISSAL WAS FOR THE PURPOSE OF PROSECUTORIAL LAW REFORM, (3) THE DEFENDANT EXPLICITLY ASSERTED HER RIGHT AGAINST DOUBLE JEOPARDY, (4) THE TRIAL COURT REFUSED TO RECOGNIZE THE ASSERTION, BUT, (5) THE TRIAL COURT NOTED THAT THE ISSUE WAS PRESERVED FOR APPEAL.

After the jury was empaneled and sworn, the prosecution called several witnesses to testify. During the testimony of a police officer, and after questioning by the court regarding the officer's failure to make an arrest of another person in a previous narcotics purchase, the trial court sua sponte dismissed the case. The trial court dismissed the case so that the appellate courts could determine the legality of an arrest of the other

person after an alleged drug buy without an arrest or search warrant. The trial court made it abundantly clear that the dismissal was intended to give the appellate courts an opportunity to expand police powers in their efforts to deal with the drug problem. In an ex parte discussion, prior to the dismissal, the prosecutor assured the trial judge that they would appeal the dismissal and pursue the legal issue. The trial judge and the prosecutor's office, in a joint effort, were seeking to enhance police powers through appellate review by interrupting Ms. Wilcox's trial. The defense was not consulted before the dismissal. Once the trial court announced on the record his decision to dismiss the case, the defense attorney informed the trial judge that jeopardy would apply. The trial court disagreed but noted that the record was preserved for appeal. The defense attorney then acquiesced in the dismissal. The trial court failed to make a personal inquiry of Ms. Wilcox of whether she would consent to the dismissal. The prosecutor did not object to the dismissal. Since the trial court's dismissal was completely unrelated to the rights of Ms. Wilcox, was not required by manifest necessity and was without the Defendant's personal consent after asserting Double Jeopardy protections, retrial is barred because Ms. Wilcox did not have control over whether the case would be dismissed.

The Double Jeopardy provisions protect an accused from being twice put in jeopardy for the same offense. US Const. Am V;

Const. 1963, Art. 1, Sec. 15. The federal provision applied to the states through the Fourteenth Amendment. Benton v Maryland, 395 US 784 (1969).

Jeopardy attaches once the jury is empaneled and sworn. Crist v Bretz, 437 US 28, 38 (1978). "Being twice put in jeopardy" includes being subjected to a retrial after the initial prosecution ends before a verdict. Crist v Bretz, supra, 437 US at 35; United States v Dinitz, 424 US 600, 606 (1976); Wade v Hunter, 336 US 684, 688 (1949). The purpose of this double jeopardy prohibition is to limit the state to having generally one and only one, attempt at obtaining a conviction. Arizona v Washington, 434 US 497, 505 (1978).

> [S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single proceeding to vindicate its very vital interest in enforcement of criminal laws. United States v Jorn, 400 US 470, 479; 81 S Ct 547, 27 L Ed2d 543 (1971) (plurality opinion).

A defendant also has a valued right to have his or her trial completed before the first trier of fact. Donum v United States, 372 US 734, 736 (1963); Wade v Hunter, 366 US 684, 689 (1949); People v Benton, 402 Mich 47, 61 (1977). If a court aborts a criminal trial before its conclusion, in the absence of the Defendant's motion for mistrial or without manifest necessity for granting the mistrial, the defendant has a valid double jeopardy claim which precludes any subsequent prosecution. Illinois v Somerville, 410 US 458 (1973). Therefore, before a judge term-

inates a trial sua sponte, the judge must engage in "a scrupulous exercise of judicial discretion" considering other viable alternatives before discharging the jury. United States v Dinitz, 424 US 600, 607 (1976); People v Benton, supra at 57.

In United States v Dinitz, 424 US 600 (1976), this Court held, "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed . . . " Id. 424 US at 609.

In the present case, the facts show an affirmative assertion of double jeopardy rights in a timely fashion and fully preserved in the trial court, notwithstanding the trial court's determined dismissal of the case on its own motion. The dismissal was declared in a manner and under circumstances in which Ms. Wilcox did not retain primary control over the course of the trial. Petitioner does not, and never has, challenged the Court of Appeal's finding that defense did not have control over the course of proceedings to be followed (6a).

The Petitioner must now bear the burden they assumed by dismissal of this case for the purpose of seeking to litigate an issue unrelated to Ms. Wilcox. If the Petitioner was interested in protecting society's right to put the Defendant to a full trial, they should have objected to the dismissal instead of assuring the trial judge they would pursue the legal issue on

which he sought review. Dismissal is the choice they elected.[1] This Court should not allow retrial when a case is interrupted for prosecutor to seek law reform.

Currently, the law of double jeopardy established by this Court allows application of specific rules to specific factual situations, placing the state courts and parties on clear notice of what is required for an application of the rules. Petitioner's complaint that this Court has failed to establish a "sane legal system" is more a product of Petitioner's inability to understand and apply the law, then this Court's failure to give direction to the law. Certainly, this case would not allow for sweeping reforms of double jeopardy law that would satisfy the Petitioner's expansive desires to create new law.[2]

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1 The Petitioner's suggestion that this Court adopt an "election theory" for purpose of double jeopardy would mean that the Defendant's objection or consent would be the sole determining fact. Although this attorney is not opposed to such a rule, the Courts have clearly established that the Defendant's objection to a mistrial would not bar retrial in at least two circumstances, which the state would unlikely be willing to now forego. Richardson v United States, 468 US 317; 104 S Ct 3081; 82 L Ed2d 242 (1984); People v Thompson, 424 Mich 118 (1985) (Retrial not barred after a hung jury mistrial declared over defense objection.) United States v Jorn, supra (Mistrial declared over defense objection but compelled by manifest necessity.)

2 What is most appalling about the Petition is the blatant and deliberate misrepresentation of the facts to style the case to make it appear cert. worthy, just as Petitioner did before the Michigan Supreme Court, who ultimately dismissed their previous leave order when the full facts were disclosed by brief and argument. This Petition not only containing significant factual omissions, but the question presented for review is framed contrary to the explicit facts in the record. The Petitioner should be sanctioned.

II. THE DECISION OF THE MICHIGAN COURT OF APPEALS WAS BASED ON INDEPENDENT STATE GROUNDS.

The Petitioner seeks Certiorari review of the decision of the Michigan Court of Appeals. The Michigan Supreme Court order of May 13, 1991 denying leave to appeal, let stand the lower court's opinion. Petitioner failed to inform this Court that the Court of Appeals opinion barred retrial on state law independent of and in addition to federal law.

The Michigan constitutional protection generally provides for broader double jeopardy protection than the federal standard. People v Carter, 415 Mich 558, 582 (1982); People v White, 390 Mich 245 (1973).

> "Michigan, unlike some other states, has its own specific constitutional protection against double jeopardy. Const 1963, art 1, sec. 15. Although the language of the state provision is nearly the same as that of the federal constitution, there are certain important differences between the state and federal tests used to establish a constitutional violation. Significantly, the Michigan rules offer broader double jeopardy protection than do the federal standards." 415 Mich at 582.[3]

In addition, the right of the prosecution to appeal in Michigan is limited by the double jeopardy provisions of state law. MCL 770.12(11); MSA 28.1109.

The Michigan Court of Appeals decision specifically held that the prosecutor's appeal was barred under the state statute, as

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[3] The Fifth Amendment provides, "no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." The Michigan constitution states, "no person shall be subject for the same offense to be twice put in jeopardy".

well as reinstatement being barred by the constitutional prohibition against double jeopardy under the state and federal constitution. People v Benton, 402 Mich 47, 54; 260 NW2d 77 (1977).

> "Consequently, the reinstatement of criminal charges against defendant is barred by the constitutional prohibition against double jeopardy. The prosecutor's appeal is barred as well." (10a) (emphasis added)

CONCLUSION

WHEREFORE, Respondent requests this Court deny the Petition for Writ of Certiorari and grant sanctions against Petitioner.

Respectfully submitted,

CRAIG A. DALY (P27539)
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Detroit, MI 48226
(313) 963-1455

ARTHUR J. TARNOW (P21270)
Counsel of Record
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Dated: July 3, 1991

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RESPONDENT

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

CRAIG A. DALY, being duly sworn deposes and says that on the 3rd day of July, 1991 he did serve a true copy of Motion for Leave to Proceed Informa Pauperis, Affidavit in Support, Brief in Opposition to a Writ for Certiorari to the Michigan Court of Appeals upon the upon the Wayne County Prosecutor, 1441 St. Antoine, Detroit, Michigan 48226 by first class mail.

CRAIG A. DALY

Subscribed and sworn to before me
this 3rd day of July, 1991.

Melinda D. Zawal
Notary Public, Macomb County, MI
Acting in Wayne County
My commission expires: 1/30/95